

### 3.0 A CRITIQUE OF TRADITIONAL LAND USE CONTROL MECHANISMS

Regulation of the use of private real property is practiced by virtually every political jurisdiction in the United States through the enactment and implementation of municipal zoning processes, subdivision regulations, building codes, eminent domain condemnation procedures, and various other mechanisms. This chapter investigates the administrative, economic, judicial, legal, and political problems which arise in the application of these land use control techniques.

Thus, Section 3.1 enumerates the practical difficulties which are encountered by municipalities in their development and utilization of municipal zoning techniques. In addition, this section describes the additional powers and complexities which are introduced into the municipal zoning process by the availability and use of complementary land use control mechanisms such as subdivision regulation and building codes. Section 3.2 similarly identifies the operational problems which arise in the exercise of the right of eminent domain to control the pattern of development of a municipality or a region. Finally, Section 3.3 contains some brief conclusions concerning the implications of this chapter relative to the continued usefulness of these traditional mechanisms as land use control techniques.

#### 3.1 Municipal Zoning

##### 3.1.1 The Nature of Municipal Zoning

The nature of municipal zoning may be best examined by evaluating the provisions contained in the Standard State Zoning Enabling Act.\* But first, it is necessary to understand the purpose of an enabling act. It must be realized that local governments, without a grant of power from the state, have no power to zone. Even if a municipality is granted general police powers, the municipality may not have the power to zone.\*\* Therefore, municipal governments

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\*Standard State Zoning Enabling Act (107).

\*\*See City of Searcy v. Robinson, 224 Ark. 344, 273 S.W. 2d 26 (1954) and Stevens v. City of Salisbury, 240 Md. 556, 214 A. 2d 775 (1964).

need a specific grant of power to zone. This grant could occur through legislative or constitutional home rule provisions, but most often the power to zone is granted in an enabling act.

Every state has an enabling act, most of which are based on the Standard State Zoning Enabling Act (SZEa). The provisions of SZEa contain numerous limitations on the municipality's power to zone. Both the power granted and the limitations on it will be examined in order to help understand current zoning practices.

Section 1 of SZEa contains the general grant of power to restrict and regulate, among other matters, the size of buildings, the density of population, the location and use of buildings or other purposes. The power to restrict and regulate various matters is limited to "promoting health, safety, morals, or the general welfare of the community." Actions taken which do not promote these specific goals are not permitted under the enabling act.

The power to divide the municipality into districts is contained in Section 2. Within the districts the regulations must be uniform "for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts." This requirement for homogeneity within a district is sometimes the basis for holding certain zoning practices invalid, such as spot zoning, contract zoning, or conditional zoning.

Section 2 also contains provisions for regulating the use of buildings and land within a district. Three general uses have been developed: residential, commercial, and industrial. Within each general use, there are often a number of subclasses. Single family residential is considered to be the highest use of land and is exclusive, meaning that no other use is permitted. In the past, uses have been cumulative, permitting higher uses to locate in lower use districts. Recently, the concept of use districts has been changing, often making every district exclusive or by differentiating between uses through performance standards.\*

The requirement that the regulations so far discussed must be contained in a comprehensive plan is presented in Section 3 of SZEa. The purpose of the comprehensive plan is to eliminate "haphazard or

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\*See discussion, Section 3.1.5.3, *infra*.

piecemeal zoning."\* The result of this requirement is to invalidate many zoning decisions which are not pursuant to a comprehensive plan or are inconsistent with the plan.

While the comprehensive plan provides uniformity and stability, the act does permit the plan to be amended or changed, which introduces flexibility into the zoning process.\*\* Further flexibility is provided in Section 7, where a board of zoning appeals may be created and empowered to "hear and decide special exceptions" and "to authorize upon appeal in specific cases such variances from the terms of the ordinance as will not be contrary to the public interest."\*\*\*

Besides amendments, special exceptions, and variances, zoning ordinances almost always contain provisions which permit nonconforming uses to continue in a district. Permitting nonconforming uses to continue is another means of providing relief from the restrictions imposed by the comprehensive plan. In the case of a nonconforming use, a use which pre-exists the adoption of the zoning ordinance is permitted to exist, even though it would not be permitted to be developed under the zoning ordinance.

A number of restrictions on nonconforming uses have been created. An owner of a nonconforming use cannot enlarge the use. If the use is terminated, either by the owner or through destruction of the premises, the nonconforming use will usually not be permitted to be reestablished. Finally, the use may be forced to discontinue, because it creates a nuisance.\*\*\*\*

Recently, zoning ordinances have forced the nonconforming use to discontinue after a certain period of time. This length of time depends upon the investment in the property and the ease of utilizing it for a conforming use. Thus, nonconforming uses of land where there is little capital investment and no impediment to using the land for a conforming use are given a short period of time to terminate. On the other hand, large, specialized buildings, which involve considerable investment and are not easily converted, are given much longer periods of time before they are forced to terminate.

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\*See Standard State Zoning Enabling Act (107), Note 22.

\*\*Standard State Zoning Enabling Act (107), Section 5.

\*\*\*Standard State Zoning Enabling Act (107), Section 7.

\*\*\*\*Hadachek v. Sebastian, 239 U.S. 394 (1915).

It can be seen that the power to zone gives the municipality the ability to restrict and regulate a wide range of activities. The scope of the municipality's power over land uses is even broader when viewed in connection with the municipality's control over building codes and subdivisions. Building codes permit the municipality to regulate the construction of new buildings. Subdivision regulation is concerned with regulating a landowner's division of his property into parcels. Among other restrictions imposed on the landowner, he may have to dedicate some property for streets, school sites, or parks. Often the regulations go further and require the subdivider to build the streets and utilities required by the subdivision.

These powers, while extremely great, are not without their limitations. Often zoning boards may not act for any proper purpose or pursuant to a comprehensive plan. When disagreement exists between the municipality and the landowners over these or other matters, judicial review is required.

### 3.1.2 Judicial Review

Judicial review from decisions of the board of zoning appeals are specifically provided for in Section 7 of SZEa. Yet, judicial review is not limited to decisions of the board of zoning appeals. The courts can also review the validity of the entire ordinance or the validity of the ordinance as applied to a particular parcel of land.

When the plaintiff seeks to have the entire ordinance declared invalid, there are two possible arguments that may be raised. First, the ordinance may be challenged on the grounds that it does not conform to the requirements of the enabling act. Some of the deficiencies alleged are that the ordinance does not have a comprehensive plan, that the municipality is not divided into districts, or that there is not the required homogeneity within a district.

Second, the ordinance may be challenged on constitutional grounds. The constitutional arguments center on the ordinance's denial of either equal protection or due process. The equal protection clause usually is invoked when a municipality treats two uses in a different manner, even though there appears to be no real distinction between the uses. For instance, prohibiting drive-in restaurants while permitting enclosed ones or permitting public facilities like a warehouse or school and prohibiting private ones, are examples of situations where the equal protection clause may be violated.

The due process clause is often invoked when the zoning ordinance either does not further a legitimate purpose or when the ordinance is not related to the furtherance of a desired goal. Again, it must be stated that zoning regulations must be enacted to promote the health, safety, morals or general welfare. Regulations enacted for other purposes are not permissible. Furthermore, if the plaintiff can show that the ordinance does not promote a permissible objective, the ordinance will be declared invalid. It must be remembered that when the constitutionality of the ordinance is questioned, the plaintiff has the burden of proving that the ordinance is unconstitutional.

The landowner, instead of attacking the validity of the entire statute, may also challenge it as applied to his particular property. There are a number of reasons why the ordinances may be invalid in its application to a particular piece of property. These include situations in which ordinances deny the property owner any use of his land, impose heavy restrictions which are not required to serve a public purpose, or have no substantial relationship to the health, safety, morals, and general welfare. It should be recognized that many of these possible reasons for declaring an ordinance invalid are overlapping.

Judicial review of zoning ordinances and decisions by zoning boards protect the property owner from being subject to arbitrary and capricious regulation of his property. Resort to the courts, while expensive and time consuming, does result in the imposition of the limitations of the zoning power contained in the enabling act and the Constitution.

### 3.1.3 Techniques to Provide Flexibility in Zoning

Numerous techniques are permitted to give zoning the flexibility required in order to serve the individual property owner and the community. Each technique has certain legal criteria which must be met before the petitioner is entitled to the relief that he seeks. If the petitioner can demonstrate that the criteria are met, relief should be granted. In cases where the zoning board rules against the petitioner, review can always be obtained in the courts.

#### 3.1.3.1 Rezoning

In Section 5 of SZEa, specific authorization is given to amend the zoning regulations. Normally, a petitioner requests that the zoning board rezone the property to a different zone, for example, from light industry to heavy industry. However, the petitioner may also ask the zoning board to consider adding a particular use to the zone, such as permitting an assembly plant which creates no noise or pollution to exist under the light industry zone, when it may have been permitted only in the heavy industry zone.

Zoning map amendments should be granted if the present zoning is not suitable for the property, where there is undue hardship, or when there has been a change of circumstances since the last zoning.

#### 3.1.3.2 Conditional Zoning

Unlike contract zoning, where the zoning board and the property owner enter into a binding agreement, conditional zoning involves the property owner's restricting his use of his land, without receiving a binding promise from the board. Of course, it is the hope of the landowner that the board will voluntarily take the action that the property owner desires. The difference between contract zoning and conditional zoning makes conditional zoning a permissible technique for creating flexibility, while contract zoning is not permissible.\* However, some conditional zoning situations may not be permitted, since they are considered to be spot zoning. \*\*

#### 3.1.3.3 Variances

Variances are probably the most widely used technique to provide flexibility in zoning. Unfortunately, along with its wide use, there is a great amount of misuse. Variances are permissible only when there is no adverse effect upon the public nor the surrounding neighborhood and only if there are particular characteristics of the property which make it deserving of special consideration. If the zoning would result in unnecessary hardship, a variance should be granted.

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\*See discussion, Section 3.1.4.2, *infra*.

\*\*See discussion, Section 3.1.4.1, *infra*.

#### 3.1.3.4 Special Exceptions

Special exceptions, like variances, are permitted by SZEa. A special exception is similar to a variance in that a showing must be made that neither the public nor adjacent property owners will be unduly harmed. However, with a special exception there is not need to show that unnecessary hardship exists.

Probably the most distinguishing feature of special exceptions is the lack of guidelines. The lack of guidelines to control administrative discretion is often responsible for having the special exceptions ruled invalid.

#### 3.1.4 Impermissible Zoning Techniques

Not all decisions made by a zoning board are permissible under the zoning ordinance. Affected property owners can challenge in the courts a board's decision to apply any of the flexibility techniques previously discussed. Furthermore, the board's decision can be challenged as being spot zoning or contract zoning, both of which are impermissible.

##### 3.1.4.1 Spot Zoning

Spot zoning involves permitting a property owner to use his property for a use which is not permitted to neighboring parcels of land. Thus, the zoning board creates an "island" which gives the property owner benefits not enjoyed by neighboring landowners. Also involved in spot zoning is the granting of benefits to a particular landowner when it is not in the public interest to do so. Lastly, spot zoning does not conform to the comprehensive plan of the municipality.

The courts have concluded that spot zoning is invalid because, it violates the comprehensive plan requirement, the need for uniformity within a district, and is contrary to the general welfare of the community.

##### 3.1.4.2 Contract Zoning

Contract zoning is another impermissible technique that has sometimes been used by zoning boards. Contract zoning involves the negotiation of a binding agreement between the landowner and the zoning board. The landowner generally agrees to restrict the use of his land, while the zoning board agrees to zone the property for a particular use and to refrain from changing the zone.

Contract zoning often violates the same principles that were mentioned in spot zoning. Furthermore, the courts have concluded that it is not proper for the municipality to bargain away its future exercise of the police power.

### 3.1.5 Expanding Environmental Criteria for Zoning

#### 3.1.5.1 Aesthetic Zoning

At one time it was thought that a zoning decision based on aesthetic considerations was not permissible under the enabling act. However, court decisions in some jurisdictions have found that aesthetic considerations are included within the general welfare provision of the enabling act. The leading case supporting this proposition is Berman v. Parker,\* which is actually an eminent domain case. At least three states consider aesthetic considerations alone to be sufficient to justify a zoning decision, while a few more jurisdictions have stated that aesthetics may be a valid criterion, but have not directly ruled on the issue.\*\*

The majority of states do not recognize aesthetic considerations as being part of the general welfare. This result may be due to the courts' hesitancy to impose one group's taste upon the remainder of the community.

#### 3.1.5.2 Design Standards

Design standards or architectural controls are a form of aesthetic zoning which so far have not been widely accepted. There have been a few cases which have upheld ordinances restricting the architectural design of buildings.\*\*\* It would appear that zoning decisions based upon design standards are still in a very early period.

#### 3.1.5.3 Performance Standards

Traditionally zoning maps were divided into zones that were classified according to the uses that were permitted or excluded from

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\*348 U.S. 26 (1954).

\*\*See Masotti and Selfon (69), pp. 773-778.

\*\*\*State ex rel Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217 (1955) and Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N. E. 2d 74 (1963).



the zone. Recently these classifications have begun to be replaced by performance standards which instead of regulating the types of activities that may exist in a zone, regulate the amount of noise, odor, and other characteristics that are permitted in the zone. Thus, instead of excluding a steel mill from a light industrial zone, under performance standards the mill would be permitted if it met the particular performance requirements for the zone.

The advantage of these standards is the ability to more effectively control the characteristics of a zone, without resorting to a detailed list of particular industries that are permitted or excluded from the zone. Under performance standards any firm is permitted as long as it conforms to the zone's standards,

#### 3.1.5.4 Population Density Controls

The enabling act specifically authorizes zoning decisions to control the population density. The two most widely used techniques for controlling population density are minimum lot sizes and minimum floor space. The minimum lot sizes have been held valid for lots as large as five acres. On the other hand, a number of courts have held that minimum lot sizes do not promote the health, safety, morals, and general welfare of the community and are thus invalid. Courts have been especially suspicious of minimum lot sizes which appear to be excluding poor persons from the community.

Minimum floor space has not received very favorable treatment with the courts. This is true probably because there appears to be no relationship between minimum floor space and the purposes of zoning. Even as a health purpose, the courts have been unwilling to uphold minimum floor space requirements,

#### 3.1.5.5 Planned Unit Development

A planned unit development involves the taking of a parcel of land and developing it as a single entity. This may or may not include a combination of residential and commercial uses. The zoning board views the development as a single unit, not from the perspective of each individual lot. The zoning board may place limits as to the number of units that it will permit, which is a form of controlling population density. Usually, while the number of units are controlled, the type of structure and its location in the development is left to the discretion of the developer. This type of zoning has been upheld under the enabling act.

### 3.1.5.6 Flood Plain Zoning

Flood plain regulations have been added to many enabling acts. Generally, flood plain regulation involves restricting buildings which may block the water channel or controlling the intensity of use of the flood plain. Often the ordinances permit compatible uses such as golf courses or parks. However, some ordinances have been held to be unconstitutional takings, since they deprive the property owner of any reasonable use of his land. Normally, if a reasonable use is permitted and if there is a risk of flood damage if a building is constructed, the ordinance will be held valid.

### 3.1.6 Structural Limitations of Zoning

Although municipal zoning potentially is capable of having a substantial impact upon the pattern of development of real property, its influence is not unlimited.

#### 3.1.6.1 The Negativity of Zoning

Zoning is essentially a negative control. It can specify only the types of development which may not be located in a particular area. It cannot specify the types of development which will be located in that area.\* Thus, the zoning of a substantial portion of a municipality for industrial use will be unsuccessful in attracting industry unless economic conditions are conducive to industrial development at those locations.\*\* Similarly, zoning is incapable of discouraging the withholding of land from development for speculative purposes. Consequently, it is not uncommon to observe the residential development of property which is relatively remote from an existing center of population prior to the residential development of equally suitable property which lies between these two locations despite the residential zoning of this intervening property. In fact, somewhat paradoxically, this pattern of development in many instances may be encouraged by the zoning of this intervening property. If this property has been zoned for very low density residential use through large-lot zoning practices, developers responding to a demand for high density residential development may be forced to bypass this property and, instead, to develop more remote property which is zoned appropriately for their purposes.

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\*Witthoford and Kanaan (117), p. 19.

\*\*Siegan (106), p. 97.

Obviously, this pattern of intermittent development imposes both unnecessarily high public facilities costs upon all residents of the community and unnecessarily high travel costs upon, at least, the residents of the new residential development.\*

#### 3.1.6.2 Limited Retrospective Application

The extent to which municipal zoning regulations can promote the modification of nonconforming uses is limited. Although the zoning process can effectively prohibit the expansion of a nonconforming use, judicial concern for the protection of the private property rights of the owner of this use generally has produced a stipulation that the zoning process may require the elimination of a nonconforming use only in certain extreme circumstances, such as the voluntary discontinuation of the use for more than a specified period of time or the destruction of the use by natural causes. Although this stance has been relaxed recently in some jurisdictions by judicial decisions which permit municipalities to require the elimination of any nonconforming use after a reasonable amortization period, it remains true that the ability of municipal zoning to modify the pattern of development of developed areas is severely circumscribed. Consequently, the major potential of municipal zoning is focused upon control of the prospective development of vacant land.\*\*

#### 3.1.6.3 Limitations of the Police Power

The police power of the state is derived from the inherent right of the government to protect the health, safety, morals, and general welfare of the people. However, this power is limited by the constitutional restriction that private property may not be taken by the government without the payment of just compensation. This restriction imposes certain constraints upon the ability of municipal zoning to control the development of private property. For example, the zoning of private land for exclusive use as public open space must be considered a taking of land and, consequently, is not a proper or legal exercise of the police power. Similarly, the protection through municipal zoning of particular property with unique characteristics, such as flood plains, waterfronts, scenic areas, and recreational areas, may

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\*American Society of Planning Officials (2), pp. 34-35.

\*\*Ellickson (41), p. 711; Lee (58), pp. 299-300; and Witheford and Kanaan (117), p. 19.

be determined to be unconstitutional takings of private property and, hence, inappropriate applications of municipal zoning. In these situations, the appropriate governmental action is the purchase of the property through either voluntarily negotiated agreement or, if necessary, the exercise of eminent domain condemnation.\*

Municipal zoning also is occasionally constrained by the requirement that any exercise of the police power must be related to the protection of the health, safety, morals, and general welfare of the people. While the judicial interpretation of the general welfare is continually expanding, many land use control techniques which some communities have attempted to embody within their municipal zoning ordinances, such as view protection, architectural design control, and the prevention of premature development, have been disallowed by the courts as unconstitutional takings of property and violations of due process of law.\*\*

### 3.1.7 Administrative Problems in Zoning

The procedural limitations which have been discussed in the preceding sections impose significant constraints upon the manner in which municipal zoning can control the use of real property. Moreover, the satisfaction of these procedural constraints is not sufficient to resolve all of the problems confronting a municipal zoning process. Consequently, in this section, the problems which arise in the administration of a procedurally sound municipal zoning ordinance are discussed.

#### 3.1.7.1 Information Requirements

The initial establishment of a municipal zoning ordinance requires, first, the definition of the particular uses which will be permitted either generally or as special exceptions in each zoning classification; second, the specification of the height, area, and setback restrictions which will be applied to each permitted use in each classification; and, third, the determination of the size and the location of each zoning district to which each of these zoning classifications will be assigned throughout the municipality. In addition, if the zoning ordinance contains any performance or design standards, the specification of the precise nature

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\*American Society of Planning Officials (2), pp. 31-34.

\*\*Ibid., pp. 48-49.

and value of each of these criteria in each relevant zoning classification must be performed. Obviously, the volume of information which must be collected, processed, and assimilated in the performance of these tasks is immense.

Moreover, the informational problems confronting the administrator of the zoning process do not terminate with the adoption of the zoning ordinance. The enforcement of this ordinance requires the continual monitoring of the land use activities of all property owners within the municipality. Once again, these monitoring requirements are much more stringent for municipalities which incorporate performance or design standards within their ordinances than they are for municipalities which rely upon more traditional zoning techniques.\*

Finally, each request for a modification of the zoning ordinance -- a rezoning, a variance, or a special exception -- imposes additional information requirements upon the zoning process. Changes in the patterns of supply and demand for particular land uses must be identified and evaluated; the characteristics of both the property for which the modification has been proposed and the neighborhood of this property must be ascertained; and the implications of approving or denying the request for modification must be analyzed. To perform these tasks adequately, information must be obtained which describes present and prospective future patterns of public and private land uses within the municipality, adopted plans for future patterns of public and private land uses, and the attitudes and preferences of the residents of the community with respect to the proposed modification. This information must then be processed and evaluated in arriving at a decision concerning the approval or denial of the proposal. The difficulty and complexity of this decision-making process is described in considerable detail by Davis and Rueter,\*\* whose analysis clearly indicates the magnitude of the information requirements confronted by the typical zoning administrator.

#### 3.1.7.2 Administration by Lay Bodies

The assimilation and evaluation of all of the information described in the preceding discussion would constitute an extremely difficult task for a trained zoning practitioner. Yet, the administration of zoning

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\*Siegman (106), pp. 96, 117-118; and Ellickson (41), p. 707.

\*\*Davis and Rueter (29).

regulations is primarily the responsibility of lay bodies -- city councils, planning commissions, and boards of zoning appeal -- which, in general, are not equipped to perform this immense information processing task. Moreover, the magnitude and difficulty of this task is continually increasing as new, more flexible, more technically complex techniques to regulate urban development are devised and implemented. Yet, apparently undaunted by this complexity and convinced of their competence as decision-makers simply because they live in the community and either own or rent property, the members of these lay bodies regularly apply their intuition to the resolution of these complex land use and urban problems. Moreover, in arriving at their decisions, these lay bodies entrust to the political process the specification of land use policies which should be determined on the basis of thorough technical analysis. Obviously, this virtually complete reliance upon the common knowledge of laymen will produce solutions to land use and urban problems which are inferior to the solutions which sophisticated technical analysis is capable of attaining.\*

### 3.1.7.3 Lack of Trained Staff

Although the problems associated with the lay administration of the zoning process could be ameliorated to some extent by the provision of substantial technical assistance to the members of the lay bodies, the provision of this assistance is severely constrained by the unavailability of trained professionals and technicians. The proliferation of governmental agencies and programs has increased the demand for skilled planners much more rapidly than the nation's colleges and universities have expanded the supply of planning professionals. Moreover, only a small portion of the graduates of planning programs choose land use regulation as a specialty. Instead, the majority of these graduates pursue more popular specialties such as urban design, new town development, and computer-based research. Finally, although many of the technical tasks associated with land use regulation do not require the completion of a graduate program in planning for their performance, few alternative programs for the development of these technical skills presently exist.\*\*

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\*American Society of Planning Officials (2), pp. 38-39.

\*\*Ibid., pp. 40-41.

#### 3.1.7.4 Conflicts with the Comprehensive Plan

Although the zoning enabling acts of most states require that zoning regulations must be developed in accordance with a comprehensive plan and despite the judicial criteria which have been established for the granting of changes in the zoning map, variances, and special exceptions, municipal zoning processes frequently approve zoning modifications which are inconsistent with adopted comprehensive plans and established judicial standards. For example, boards of zoning appeal have granted variances and special exceptions primarily on the basis of the benefit which will accrue to the owner of the property for which the variance or special exception has been requested. Moreover, these boards occasionally have granted variances which constitute substantial modifications in the zoning regulations which apply to particular areas when the boards have concluded that the legislatively established restrictions are no longer consistent with the best interests of the area. Thus, in effect, these administrative boards have been enacting legislative changes in municipal zoning ordinances despite their complete absence of any direct accountability to the residents of the municipality through the voting process.\*

Similarly, municipal legislatures also have been known to approve modifications of the zoning map which are inconsistent with the stipulations of their own adopted comprehensive plans. Specifically, city councils have permitted the rezoning of single parcels and small enclaves of land for uses which are different from, and allegedly incompatible with, the uses which are permitted in adjacent districts.\*\*

#### 3.1.7.5 Contradictions Among Ordinances

The zoning ordinance is not the only governmental instrument which regulates the use of land in a municipality. The development and use of real property also is controlled by subdivision regulations, building codes, health codes, official maps, mapped street ordinances, and licensing ordinances. Since these various statutes normally are developed by the staffs of different municipal agencies, it is not uncommon for the standards which are established in one of these

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\*This practice of boards of zoning appeal is severely criticized in Bryden (11), pp. 287-326. Conversely, it has been defended as a practical approach to introducing flexibility into the zoning process in Sussna (108), pp. 82-87.

\*\*American Society of Planning Officials (2), pp. 25-29.

statutes to be inconsistent with the standards which are specified in one, or several, of the other statutes. This lack of coordination among the staffs of the various agencies unnecessarily complicates the problems confronting the property owner when he attempts to develop or use his property.\*

#### 3.1.7.6 Lack of Intra-Governmental Cooperation

The failure of governmental agencies to coordinate their activities occurs not only when these agencies are formulating policies, but also when they are applying these policies in specific situations. Boards of zoning appeal frequently have granted variances which conflict with the intent of the zoning ordinance, the recommendations of the professional planning department, and the desires of the city council. Similarly, municipal legislatures themselves occasionally authorize the construction of public improvements in locations which are inconsistent with adopted land use plans and regulatory ordinances.\*\*

This lack of coordination becomes more pronounced when one or more of the agencies which are involved in a potential conflict situation are not formally associated with the zoning process. Thus, the consequences of proposed zoning actions for traffic movement frequently fail to be recognized by the zoning process merely because this process does not consult with municipal traffic engineers or traffic planners either when it establishes zoning standards or when it reviews zoning proposals.\*\*\*

Although inconsistencies of this type could be resolved to some extent by the requiring of coordination among these agencies by the municipal legislature (since the municipal transportation agency and all of the agencies in the zoning process are directly dependent upon the municipal legislature for their decision-making authority and their funding), this method of conflict resolution is ineffectual when the agency whose policies conflict with zoning regulations have decision-making authority and sources of revenue which are independent of the municipal legislature. Consequently, it is necessary to rely on voluntary cooperation to resolve conflicts between the municipal zoning process and such local, regional, and state agencies as school boards,

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\*Ibid., pp. 47-48.

\*\*Ibid., pp. 54-55.

\*\*\*Witheyford and Kanaan (117), p. 154.



water and sanitation authorities, urban renewal agencies, public housing authorities, and state highway commissions. The inadequacy of voluntary cooperation is clearly evidenced by the frequency with which these independent agencies authorize public improvement projects (i.e., school construction water and sewer expansion, urban renewal projects, public housing developments, or highway construction) which conflict with adopted land use plans and the objectives of the zoning process.\*

A final source of intra-governmental conflict arises between municipal taxing agencies and the zoning process. The zoning process may attempt to control the growth of a community by imposing restrictive classifications upon particular parcels of land. Unless the public assessor assesses these parcels of land solely on the basis of their value in this restrictive use, it is difficult for the administrators of the zoning process to deny the rezoning of this property to a less restrictive classification on the grounds that the excessive taxes cause the more restricted use of the property to be uneconomic. Yet, public assessors often create precisely this problem by refusing to recognize the permanence of the restrictive zoning classification; assessing the property on the basis of a less restrictive, higher valued use; and thereby subverting the objectives of the zoning process.\*\*

#### 3.1.7.7 Lack of Dialogue Among Participants

The process of municipal zoning embodies a complex unit of legal precedents and restrictions, planning policies, economic forces, and political pressures. Yet, the typical lawyer, planner, developer, and legislator who is involved in this process makes few attempts to understand the objectives, the assumptions, or the analytical frameworks of the decision-making procedures which are employed by the other participants in this process. This general lack of understanding makes the establishment of a reasonable dialogue among the various participants in any zoning action extremely unlikely; and this absence of dialogue inevitably generates conflict in many situations in which cooperation or compromise otherwise could have been attained.\*\*\*

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\*American Society of Planning Officials (2), pp. 55-57.

\*\*Ibid., p. 34.

\*\*\*Babcock (3), p. 100.

### 3.1.7.8 Unintended Economic Impacts

Inherent in municipal zoning's power to control the use of land is the power to control the economic return to the owners of land. This power to influence the distribution of income creates numerous conflicts. Thus, the establishment of a zoning classification which makes a particular use nonconforming not only eliminates the possibility of any expansion of this use, but also creates for its owner a substantial degree of local monopoly power based upon the prohibition of the development of any competitive use of this type in the immediate vicinity. Clearly, in arriving at zoning decisions which involve the creation of nonconforming uses, anti-competitive tendencies of this type should be considered by the zoning process.\*

Similar problems arise when zoning administrators attempt to plan for commercial expansion. If the zoning process desires to permit the development of only that volume of commercial facilities which it believes will be economically viable, it is likely that the number of proposed developments will exceed the number of developments which the zoning process desires to permit. Therefore, the zoning administrators will be required to select the particular developments in the total group of proposed developments which will be permitted to proceed. This decision will simultaneously grant economic returns to the potential developers whose proposals are approved and deny economic returns to the potential developers whose proposals are rejected. This undesired consequence constitutes a significant dilemma for the zoning administrators. However, if these administrators decide to avoid this dilemma by permitting the development of all proposed commercial facilities which are compatible with their immediate neighborhoods and create no substantial traffic problems, they inevitably will be confronted with the problem of determining the disposition of those facilities which fail to become economically viable.

This conflict between competing economic interests arises in its most emotional form whenever the zoning process is required to act upon a proposal for the development of a commercial facility which will compete with existing commercial uses in the central business district of the community. Approval of the proposal will deny economic returns to the owners of the established commercial uses in the central business district and will accelerate the decline of that district; while rejection

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\*American Society of Planning Officials (2), pp. 24-25.

of the proposal will deny economic returns to the owners of the property which is proposed for development and will withhold the availability of this proposed development from its prospective clientele. The process of land use regulation is inextricably involved with the redistribution of income and wealth.\*

#### 3.1.7.9 Delays in Response to Changes in Market Conditions

The pattern of demand for real property is inherently dynamic. Areas which previously have been appropriate for single-family dwellings become suitable for higher density residential development. Existing commercial districts decline while other areas become ripe for commercial development. In the absence of any restrictions upon the development of real property, these changes in demand patterns will relatively quickly be transformed into changes in land use patterns. However, when the establishment of these revised land use patterns is prohibited by existing zoning regulations, time and resources must be devoted to obtaining a modification of these regulations. Thus, a real property market which is constrained by land use regulations will respond less rapidly to changes in demand patterns than will an unrestricted real property market. Moreover, to the extent that a substantial accumulation of unfulfilled demand must exist before the zoning process will submit to a modification of its regulations, land development in zoned communities is likely to follow a pattern of long periods during which no development occurs interspersed with relatively short periods of intensive development activity. This phenomenon can create substantial inefficiency in the land development industry.\*\*

#### 3.1.7.10 Cost of Modifying the Ordinance

Obtaining a modification of the regulations which apply to a particular property invariably imposes substantial costs upon the owner of that property. Generally, he will be required to pay an administrative fee when he submits his request for rezoning. Moreover, even for minor changes in zoning, the property owner must devote considerable time and effort to presenting the details of his proposal informally to the professional planning staff and formally at a public hearing before the municipal legislature. In addition, for major zoning changes,

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\*Babcock (3), pp. 70-73.

\*\*Ellickson (41), p. 696.

"...large developers often wine and dine local officials, hire expensive consultants to make presentations at public hearings, initiate large public relations campaigns, and make judicious campaign contributions to key local officials."\*

Finally, if all of these efforts fail to induce the desired modification of regulations, the property owner may decide to challenge the municipality's decision in the courts. However, zoning litigation is expensive. To convey a clear impression of the nature of the neighborhood in which the rezoning is being requested, expertly prepared maps and detailed photographs must be presented. Moreover, this demonstrative evidence must be supported by expert testimony by planners, appraisers, traffic engineers, and individuals who are knowledgeable about the particular type of development which is involved in the case. The fees charged by these experts are substantial. Yet, the value of the benefit which will accrue to the litigant if the rezoning is approved is not infinite. Hence, property owners frequently will either decline to challenge inappropriate local zoning decisions or restrict their expenditures for zoning litigation to levels which are insufficient to permit the preparation and presentation of adequate legal actions. The necessary consequences of decisions of this type is the prohibition of socially desirable developments and the misallocation of land uses to real property.\*\*

#### 3.1.7.11 Improprieties in Zoning Administration

The approval of any proposed modification of zoning regulations is expected to convey benefits upon the property owners who have requested this modification and, often, to impose losses upon other property owners. These expectations of benefits and losses provide incentives to these property owners to influence zoning administrators to make decisions which are favorable to their particular interests. Occasionally, this influence assumes the illegal form of the payment of graft to these local officials.\*\*\*

Additional possibilities for impropriety arise when a zoning administrator has a personal interest in a proposed modification of

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\*Ibid., p. 698.

\*\*Babcock (3), pp. 93-94.

\*\*\*American Society of Planning Officials (2), p. 45; and Siegan (106), p. 98.

regulations. Although it appears reasonable to expect any official who is confronted with a potential conflict of interest of this type to disqualify himself from participating in the resolution of the relevant zoning action, neither voluntary nor mandatory disqualification is universally practiced.\*

Impropriety may also arise in the pursuit of municipal objectives. Thus, to reduce public expenditures, a municipality might rezone to a more restrictive classification a parcel of land which is destined to be condemned for the development of a public project. This action, which will reduce both the fair market value of the property and the amount of compensation which the municipality must pay to the property owner, rarely will withstand judicial scrutiny if it is detected.\*\*

Finally, impropriety may result from the arbitrariness and capriciousness of zoning administrators. The power to influence municipal zoning decisions incorporates within itself the ability to dispense favors. The exercise of favoritism almost inevitably will produce an unequal treatment by the zoning process of essentially identical requests for modifications of regulations.\*\*\*

#### 3.1.7.12 Conflicts Between Municipal and Regional Goals

The authority to control the use of real property through the application of municipal zoning procedures generally resides with the municipal government. Yet, many local zoning actions produce social and economic impacts which extend beyond the boundaries of the municipalities which take these actions. Unless these regional impacts are appropriately considered by the municipal zoning administrators, the land use pattern which is generated by this localized decision-making structure is extremely likely to be inefficient.\*\*\*\*

##### 3.1.7.12.1 Border Frictions

In the absence of coordination between the decision-making processes of the zoning administrators of adjacent municipalities, the

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\*American Society of Planning Officials (2), p. 46.

\*\*Ellickson (41), p. 702.

\*\*\*Siegan (106), p. 131.

\*\*\*\*American Society of Planning Officials (2), pp. 7 and 51; and Geldon (44), p. 386.

land uses which are permitted under the regulations which apply to the property on one side of a municipal boundary may be incompatible with the land uses which are permitted (and, conceivably, have already been developed) under the regulations which apply to adjacent property on the other side of that boundary. This incompatibility may arise either from the adverse external effects which the former land uses directly impose upon the latter land uses or from the excessive demands which the former land uses impose upon public facilities which have been intended to serve only land use of the latter type. In particular, the first situation might occur if one municipality permits the development of light industrial uses which generate noxious odors on property which is adjacent to an area of high-class, low-density residential development in another municipality; while the second situation might be observed if one municipality permits the development of land uses which attract large volumes of traffic over streets which have been designed for only light traffic volumes in an adjacent municipality.\*

#### 3.1.7.12.2 Exclusionary Zoning

In some jurisdictions, municipal zoning is employed as a mechanism to exclude particular socioeconomic groups from establishing residence. The direct exclusion of racial minorities through the specification of zoning classifications on the basis of race uniformly has been overruled by the courts. However, municipal zoning administrators have successfully produced this desired result indirectly by enacting zoning regulations which effectively exclude low-income families and individuals from residing in their communities.

The zoning technique which is most frequently asserted to be a mechanism which has been employed for this purpose is the specification of unusually large minimum lot sizes in residential zoning classifications.\*\* However, an early empirical study sponsored by the Urban Land Institute has concluded that, if the price per acre of land does not increase as the required minimum lot size decreases and if the subdivision regulations relative to public improvements are relaxed as the density of residential development decreases, the specification

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\*American Society of Planning Officials (2), pp. 7-8 and 52; Reps (91), p. 59; and Siegan (106), p. 113.

\*\*See, for example, American Society of Planning Officials (2), pp. 36-37 and 51-52; Babcock (3), pp. 92-93; Bronstein and Erickson (10), pp. 737-747; Ellickson (41), pp. 704-705; Fisher (42), pp. 129-148; Geldon (44), pp. 380-402; Urban Land Institute (111); and Sagalyn and Sternlieb (96).

of large minimum residential lot sizes will not necessarily cause a substantial increase in the cost of residential construction.\* This conclusion has been challenged severely by the results of a recent empirical study by Sagalyn and Sternlieb, who present statistical evidence which demonstrates that the common municipal practice of combining large minimum floor area specifications, large frontage requirements, and stringent street and public utility standards with large minimum residential lot size requirements will produce a substantial increase in the cost of residential construction.\*\* Moreover, even in the absence of these complementary restrictions on residential development, the requirement of large minimum lot sizes reduces the total number of dwelling units which can be constructed in the municipality. If the demand for housing is unaffected by this regulation, this restriction of the potential supply of residences will increase both the market price of a residence and, consequently, the market price per acre of undeveloped land.\*\*\*

It is also claimed that the exclusion of potential low-income residents has been effectively performed through the municipal prohibition of multiple-family residential developments and mobile homes\*\*\*\* and through the forbiddance of the establishment of industrial uses which might provide employment for low-income workers.\*\*\*\*\* Although all of these zoning techniques have been challenged in the courts on the basis of both their inconsistency with the general welfare and their unconstitutionality, the courts generally have been reluctant to sustain these challenges and, thereby, to deny the validity of municipal legislative actions -- despite the social desirability and potential economic efficiency of providing housing and employment for low-income groups somewhere in the region or, at least, the nation.

#### 3.1.7.12.3 Fiscal Zoning

Municipal zoning administrators frequently sacrifice the attainment of the best pattern of land uses for the future in an attempt to improve the financial position of the municipality in the present. Some

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\*Urban Land Institute (111).

\*\*Sagalyn and Sternlieb (96), pp. 64-70.

\*\*\*Geldon (44), p. 392.

\*\*\*\*Ellickson (41), p. 704; and Fisher (42), p. 130.

\*\*\*\*\*American Society of Planning Officials (2), p. 37; and Babcock (3), pp. 56-57.

of these fiscal zoning actions are intended to increase municipal revenues; while others are designed to avoid or, at least, to reduce incremental public expenditures. Thus, a municipality might assign industrial or commercial zoning classifications to excessively large areas of land in an attempt to attract developments which will improve the tax base and increase employment in the community.\* Conversely, it might establish large minimum residential lot sizes, limit or prohibit the development of multiple-family dwellings, restrict or forbid mobile homes, and specify excessively high zoning, subdivision regulation, and building code standards in order to impede the provision of low-cost or moderate-cost housing which increases municipal expenditures (especially educational expenditures) more than it increases municipal tax revenues. Clearly, the adoption of either of these measures, if successful, will reduce the tax burden of the existing residents of the municipality below the level which it will attain if the action is not taken and, consequently, may avert a politically undesirable tax increase. However, these policies also will impose increased tax burdens upon those other municipalities in which these industrial and commercial developments otherwise would have been located or in which the low-income and moderate-income families and individuals will now be forced to reside. Zoning actions which are locally desirable may be regionally inefficient.\*\*

#### 3.1.7.12.4 Regional Resource Utilization Patterns

The actions taken by the zoning administrators of one municipality may have severe impacts upon the availability and utility of certain resources to other communities within the region. The permission of particular industrial uses which provide substantial employment in one municipality may generate serious air pollution or water pollution problems in neighboring jurisdictions. The prohibition of sand and gravel mining by a local legislature may severely restrict the availability and substantially increase the cost of these resources in nearby communities. Conversely, the improper control of the restoration of quarries and pits by one municipality may cause significant problems of environmental degradation in adjacent jurisdictions.\*\*\*

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\*American Society of Planning Officials (2), p. 35; Gillespie (46), p. 728; and Siegan (106), p. 140.

\*\*American Society of Planning Officials (2), p. 69.

\*\*\*Ibid., pp. 8-9 and 52.



Although all of these inter-governmental conflicts might be eliminated or, at least, ameliorated to some extent by the assignment of authority for the regulation of the use of real property to regional governments or agencies, this centralization of decision-making will substantially increase the intensity of many other administrative problems and will decrease the extent to which the zoning process permits self-determination of the resolution of land use problems by the people who are most directly affected by these problems. A choice must be made between the internalization of regional conflicts and the efficiencies of decentralized decision-making.\*

### 3.1.8 Political Problems in Zoning

Theoretically, municipal zoning constitutes a coherent, consistent, and accessible system of comprehensible and practical regulations of the use of real property which are applied impartially to a community as a whole. However, this mechanism for reconciling competing claims to the use of land necessarily -- and rationally -- has been entrusted to the political process for its administration. This assignment of administrative authority inevitably makes the zoning process susceptible to a variety of competing political pressures.

#### 3.1.8.1 Interest Group Influences

The adoption of a new zoning ordinance, the amendment of an existing zoning ordinance, or even the implementation of established zoning regulations will provide benefits to some individuals and will impose costs upon others. Recognizing this fact, individuals whose interests potentially will be affected by a particular zoning action will be motivated to form interest groups in an attempt to influence the decision which eventually will be made by the administrators of the zoning process. However, the likelihood that these motivations will be sufficient to produce the formation of an effective interest group is dependent upon the intensity and the dispersion of the interests which might be affected by the particular zoning action. Thus, a small number of strongly interested persons is much more likely to organize an effective interest group than is a large number of moderately interested persons in any particular situation -- despite the possibility that the total impact of the proposed zoning action upon the individuals who

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\*Ibid., p. 9; Geldon (44), pp. 394-395; and Reps (91), pp. 59 and 63.

fail to organize effectively may be substantially greater than the total impact of this action upon the individuals who have succeeded in coalescing their interests.

To the extent that the political process recognizes and responds more favorably to organized interest groups than it does to amorphous, unenunciated interests, this bias in the pattern of interest group formation will produce a lack of impartiality in the zoning process and inefficiency in the allocation of activities to land. This phenomenon provides a convincing explanation for the intense activity and substantial effectiveness of local interest groups in inducing zoning actions which promote their parochial interests at the expense of the more dispersed interests of the community as a whole.\*

In addition, the complexity of the typical municipal zoning process places a strong emphasis upon technical and political expertise. Thus, an interest group whose leaders are knowledgeable about the intricacies of the administrative structure of the zoning process and aware of the political commitments of the zoning administrators and municipal legislators is more likely to obtain favorable zoning actions than is an interest group whose leaders lack these qualifications.\*\*

Although the compromise decisions which emerge from a process which effectively excludes unorganized, politically ignorant, or politically unskilled groups may be entirely satisfactory and appropriate to the legislative procedures of a representative society, they may be unacceptably inefficient as standards for the control of real property.\*\*\*

#### 3.1.8.2 Political Favoritism

An individual who is personally acquainted with and has access to the decision-makers within the zoning process can obtain both valuable technical assistance in the preparation of his appeals to that process and, in some cases, direct favors from the administrators of that process. This accessibility provides this individual with a substantial comparative advantage in obtaining desired zoning actions. Clearly, this political favoritism is not necessarily consistent with the attainment of efficiency in the regulation of the use of land.\*\*\*\*

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\*Makielski (65), p. 19; and Siegan (106), p. 138.

\*\*Makielski (64), and Makielski (65), pp. 17-18.

\*\*\*Siegan (106), p. 132.

\*\*\*\*Siegan (106), p. 131.

### 3.1.8.3 Implications of Majority Rule

If the elected officials who participate in the administration of the municipal zoning process desire to retain their positions, their actions must please at least a simple majority of their constituency. Therefore, a rational political decision-maker will only support those zoning actions which will increase the number of votes which he will receive in his next election campaign. As a consequence of this political incentive, a democratic political process occasionally may impose zoning regulations which are overly protective of existing land uses and, hence, impede the transition of the real property market toward more efficient land use configurations.\*

In addition, if a particular group of individuals consistently support the minority position in zoning actions, the democratic political process may systematically generate zoning decisions which are contrary to the interests of these individuals. Unless personal preferences are sufficiently diverse to permit shifting coalitions to organize in support of different zoning proposals, there is no reasonable assurance that the zoning process will at some time provide benefits to each member of the community.\*\*

### 3.1.8.4 Political Delay

The complexity of the typical municipal zoning process presents numerous opportunities for zoning administrators to delay the processing of any particular zoning action. Moreover, any delay which is introduced into the processing of a zoning proposal is likely to impose substantial costs upon the developer who has initiated the proposal. Consequently, municipal decision-makers are frequently alleged to employ these opportunities for delay to induce developers to agree to restrictions upon their right to develop their property, such as the compulsory dedication of property for schools and parks or the execution of a covenant constraining the possible future use of the property. Although many of these restrictions will be invalidated by the courts if they are challenged, the high cost of zoning litigation and the realization that the municipality can introduce further delays into the development of the property at subsequent stages of the regulatory process (e.g., building permit approval, health code inspection, occupancy

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\*Davis (27).

\*\*Geldon (44), p. 385.

permit approval, etc.) generally discourages developers from exercising their right to request judicial review.\*

### 3.1.9 Economic Problems in Zoning

The primary economic justification which has been advanced for the imposition of municipal zoning restrictions upon real property markets is the allegation that there exists between various types of land uses certain uncompensated external economic effects which prevent the unrestricted market from functioning in a manner which is consistent with the attainment of economic efficiency. Therefore, it is asserted that the political process must intervene in this market to protect property owners against the potential erosion of their wealth. Moreover, it has been demonstrated that, within the context of a static analysis, a market mechanism which is perfectly regulated according to the basic zoning strategy is capable of attaining economic efficiency. In addition, with relatively obvious restatements of initial conditions, this analysis can be extended to demonstrate the potential economic efficiency of municipal zoning in a dynamic context.\*\*

#### 3.1.9.1 The Empirical Validity of Zoning

Several recent studies\*\*\* have empirically investigated the theoretical economic justification for zoning by attempting to isolate systematic statistical relationships between the market values of residential properties and the characteristics of the neighborhood surrounding these properties. Uniformly, these studies have failed to isolate empirically the external effects which the relevant zoning ordinance implies should exist. Consequently, on the basis of the presently available evidence, it appears doubtful that the traditional economic rationale for the adoption of municipal zoning regulations is justifiable.

In addition, one of these studies has also investigated the relationship between the zoning classifications which have been assigned to various residential properties and the market prices of those properties.\*\*\*\* This investigation has concluded that the existing assignment of zoning classifications to residential properties has not had any statistically significant effect upon the market prices of the properties.

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\*Babcock (3), pp. 53-54 and 90.

\*\*Davis and Winston (30).

\*\*\*Crecine, Davis, and Jackson (21); Maser, Riker, and Rosett (67); and Rueter (95).

\*\*\*\*Maser, Riker, and Rosett (67).

That is, there is no evidence that zoning, as it actually is applied, restricts the quantity of land which can be devoted to any particular use sufficiently to cause this type of land to become relatively scarce and, hence, to elevate its market value. If this conclusion is generally valid, it raises serious questions about the potential effectiveness of municipal zoning as a land use control technique.

#### 3.1.9.2 Inefficiency of Mandatory Controls

The compliance of property owners with zoning regulations is mandatory. Potential violators of these regulations are denied building permits or occupancy permits; while existing violators may be forced to comply with the stipulations of the zoning ordinance through the issuance of mandatory injunctions. This reliance upon mandatory compliance as an enforcement mechanism might promote economic efficiency in the regulation of the use of land if there is reasonable certainty that the restrictions which are specified in the current zoning ordinance are precisely those restrictions which will optimally control the interdependencies which exist in the real property market. However, the previously discussed administrative inefficiencies, political influences, judicial constraints, and economic problems inherent in the management of the zoning process strongly suggest that this situation generally will not prevail. Rather, it appears likely that the zoning regulations which have been established in any typical municipality will generate, or at least will fail to ameliorate, numerous economic inefficiencies in the market for land.

Under these circumstances, insistence upon mandatory compliance with zoning regulations is tantamount to requiring the continuation of these economic inefficiencies. It appears preferable to attempt to develop an enforcement mechanism for the zoning ordinance which will encourage deviations from strict compliance with the provisions of this ordinance if these provisions are inconsistent with the attainment of economic efficiency. For example, this objective might be successfully promoted if the penalty for violating the provisions of the zoning ordinance were limited to the payment of a fine or an award for damages which approximates the nuisance costs which result from the lack of compliance. Thus, if the value to a property owner of violation of an inefficient zoning regulation exceeds the amount of this fine, the property owner can choose to violate this regulation, pay the fine, and increase the economic efficiency of the real property market.\*

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\*Ellickson (41), pp. 706-708.

### 3.1.9.3 The Desirability of Compensation

The enactment of a zoning regulation which prohibits the establishment of a land use for which there is an effective demand upon a particular site will adversely affect the value of that site. Similarly, the approval of a modification of the zoning ordinance which will permit the development of a land use on one property which will generate adverse economic effects for neighboring properties will reduce the market values of these neighboring properties. However, in general, the courts do not require the payment of compensation to those property owners who suffer a decrease in their wealth as a result of these exercises of the police power. Yet, the absence of a judicial requirement of the payment of compensation to property owners whose wealth is adversely affected by the implementation of the zoning ordinance does not necessarily imply that this payment of compensation is socially or economically undesirable. Rather, it is conceivable that the payment of compensation will promote the attainment of valid social objectives by ameliorating inequities which arise from the impact of the enactment of zoning regulations upon the prevailing distribution of wealth.\* Moreover, it is possible that the payment of compensation will induce greater economic efficiency in the regulation of the use of real property by causing the administrators of the zoning process to recognize the costs which are imposed upon individual property owners when particular zoning restrictions are imposed upon their properties.\*\* Obviously, these potential benefits which might arise from the payment of compensation must be compared with the costs of establishing and administering a compensation system in determining the overall social and economic desirability of adopting this policy.

### 3.1.9.4 The Consequences of Non-Zoning

Perhaps the strongest indication that municipal zoning is not universally necessary as a mechanism for the regulation of the use of land is provided by the experience of Houston, Texas -- the only major city in the United States which has not adopted a comprehensive zoning procedure. Interdependencies between private land uses are controlled in Houston by voluntarily negotiated deed restrictions and private covenants, which are legally binding for a specified period of time and usually are automatically renewed unless they are modified by a majority of the property owners who have been bound by the restrictions.

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\*Davidson (26), p. 44; Penny (84), pp. 261-266; and Reps (91), p. 63.

\*\*Davidson (26), pp. 47-48.

The pattern of land uses in Houston is virtually indistinguishable from the land use configuration of most major zoned cities. Economic forces produce a natural separation of land uses. The rate of appreciation of the values of residential properties in Houston appears to be equivalent to the appreciation rate of these values in other cities. In fact, the only minor differences which have been observed are a greater availability of multiple-family residential developments and lower apartment rents, a greater intensity of commercial development adjacent to major thoroughfares, and a higher incidence of non-residential land uses in residential neighborhoods in Houston relative to other cities.\*

Thus, to the extent that similar patterns of development might have evolved in other municipalities in the absence of the imposition of any zoning regulations, the enactment and implementation of zoning processes may have been, at best, superfluous and, at worst, extremely wasteful of society's scarce resources. Yet, it is important to recognize that Houston's pattern of development undoubtedly has been influenced by its location on a flat plain which imposes no geographical limitations upon its expansion.\*\* Consequently, it is possible that voluntarily negotiated restrictive covenants will constitute inadequate land use control mechanisms in municipalities exhibiting topographic conditions which differ substantially from those of Houston.

### 3.2 Eminent Domain

#### 3.2.1 The Nature of Eminent Domain\*\*\*

Eminent domain is the right of public authority to appropriate private property with or without the consent of the owner of the property. This sovereign right is possessed by both the Federal government and the individual state governments, although the Federal prerogative takes precedence over the state prerogative when both governments attempt to exercise the power of eminent domain over the same property at the same time. Moreover, although the right to

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\*Geldon (44), pp. 399-400, and Siegan (106), pp. 75-129.

\*\*Geldon (44), p. 400.

\*\*\*The material presented in this section has been abstracted from Edens (40), pp. 314-316, and Lawrence (57), pp. 1-8.

initiate eminent domain proceedings formally resides only with the Congress or the state legislatures, this right can be -- and frequently is -- delegated to administrative agencies, which may include municipalities, public corporations, private corporations, and private individuals. This delegation of power generally is motivated by the complexity of the process of acquiring property and must be based upon public necessity. The rights which are granted may be restricted by any qualifications which the delegating legislature considers to be appropriate.

The only substantive limitations which are imposed upon the exercise of the right of eminent domain at the Federal level are embodied in the provisions of the fifth amendment to the Constitution, which declares: "...nor shall private property be taken for public use without just compensation." Thus, before any authorized agency can exercise its right of eminent domain, the Constitution requires that this agency must demonstrate both that the property which it is acquiring will be devoted to a public use and that just compensation has been paid for the property. Moreover, the constitutions of approximately half of the states also require the payment of compensation when private property is damaged, but not taken, by an action of an authorized agency.

In addition to these substantive limitations, certain procedural restrictions are imposed upon the exercise of the power of eminent domain by the constitutional requirement of due process of law. In particular, the courts have broadly interpreted this requirement as an obligation upon them to guarantee that the purpose of the acquisition of private property is the provision of a public use, that the compensation which has been offered for this property is adequate, that any delegation of the power of eminent domain is valid, that the individual who owns the property which is being acquired has received appropriate notice prior to the taking, and that this property owner has been given an opportunity to be heard before a lawful public tribunal which employs procedures which do not violate his fundamental human rights.

The specific processes which have been developed by the Federal government and the various state governments to satisfy these procedural restrictions are determined by the statutory laws of these jurisdictions and, consequently, differ among jurisdictions. Nevertheless, these eminent domain processes can be classified roughly into two mutually exclusive categories: those processes which acquire property through the issuance of administrative orders and those processes which acquire property through the proclamation of judicial decrees.



The essential practical distinction between these two types of processes consists in the relative timing which they apply to the acquisition of possession of the property and the adjudication of the terms of this acquisition. In administrative processes, possession precedes adjudication. Thus, upon the satisfaction of certain specified conditions, the agency which desires to condemn a particular property can acquire title to that property. Only after this action has been completed is the previous owner of the condemned property permitted to challenge either the validity of the condemnation of his property or the adequacy of the compensation which has been offered for this property. Conversely, in judicial processes, adjudication before a trial court precedes the condemnation of any property. However, the agency which has initiated the eminent domain proceeding is permitted to acquire title to the property immediately upon the issuance of an order of condemnation by the trial court and, hence, prior to the conclusion of any appellate proceedings before tribunals other than the trial court.

### 3.2.2 The Public Use Concept

The legal justification for every exercise of the right of eminent domain is that property which is acquired will be employed for a public use. Consequently, the primary legal objection which can be raised to challenge any particular application of the power of eminent domain is that the proposed utilization of the condemned property does not constitute a public use. The difficulty which confronts the courts when they are asked to adjudicate an objection of this type is the interpretation of the concept of public use.

There are two basic judicial interpretations of this concept. The narrow interpretation maintains that a public use exists only when the public is entitled by right to use or to enjoy the use of the property which has been condemned; while the broad interpretation declares that the condemnation and subsequent use of a property is merely required to promote the public benefit or common good to a perceptible degree in order to be considered a public use.\* Initially, the more restrictive narrow interpretation of the concept of public use predominated in the courts of this country and, consequently, the application of the right of eminent domain was severely constrained. However, in more recent years, the judicial interpretation of this concept has been broadening

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\*Boyce (8), pp. 299-300; Lawrence (57), p. 8; and MacAffer (63), p. 57.

to the extent that the government now is permitted to condemn property for purposes which previously have been prohibited. In particular, broader exercise of the public power of eminent domain has been allowed in the acquisition of property for purposes of urban renewal, conservation of natural resources, and the preservation of open space.\* Moreover, its application has been permitted in forms other than the acquisition of property in fee simple, such as condemnation and subsequent leasing of property to private individuals, temporary acquisition and ensuing resale of property to private individuals subject to the provisions of a development plan, procurement of development rights or easements, and acquisition of access rights to property.\*\* However, there are still several areas in which the application of the power of eminent domain might be socially desirable, but relative to which courts have not established clear precedents.

#### 3.2.2.1 Excess Acquisition

Excess acquisition constitutes acquisition through the exercise of the right of eminent domain of more property than is actually necessary for the physical development of a public improvement. Thus, this acquisition is incidental to the provision of the public improvement by the condemning agency. Yet, it is undertaken by this agency for the purpose of holding, selling, leasing, or exchanging the “excess” property in promotion of the public interest. Three distinct alternative justifications for this application of the right of eminent domain have been advanced.

First, it is asserted that the acquisition of precisely that property which is required for the development of a particular public improvement frequently will result in the creation of remnant parcels of land which are inappropriate for any reasonable use. The acquisition of these remnants by the public authority provides an opportunity to replot them into usable parcels which can subsequently be resold. The courts have generally accepted this justification for excess acquisition whenever it has been applicable.

Second, it is argued that the inappropriate development of property adjacent to a public improvement can adversely affect the efficiency with which this public improvement can be used. Consequently,

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\*Boyce (8), pp. 300-301.

\*\*Wittheford and Kanaan (117), p. 11.

it is proposed that the right of eminent domain should be exercised to acquire this adjacent property, which can subsequently be sold or leased subject to restrictions which will protect the public improvement from adverse external effects. The receptivity of the courts to this potential justification of excess acquisition has been mixed. In some instances, the courts have objected to the right of the public authority to sell the excess property which it has acquired. Yet, the courts have also permitted the use of excess acquisition for aesthetic purposes in several past decisions.

Finally, it is contended that, since the development of public improvements may increase the value of adjacent properties, the excess acquisition and subsequent resale of these adjacent properties should be pursued to obtain for the public authority this incremental value and, hence, to recoup some of the costs of providing the public improvement. The courts generally have rejected this potential justification of excess acquisition whenever it has been challenged. However, the recent use of excess acquisition solely for recoupment purposes on TVA projects has not yet been challenged and, hence, is evidently being tolerated by the public.\*

#### 3.2.2.2 Advance Acquisition

Improved urban land normally is developed with extremely durable and expensive capital improvements which determine the character of the services which will be rendered by this land for extensive periods of time. The substantial expense associated with the modification of these improvements by demolition or conversion introduces a significant element of irreversibility into the process by which uses are allocated to parcels of urban land. This irreversibility would have few implications for the public regulation of the use of urban land if it were not true that particular sites offer very specific locational advantages for certain public facilities. However, since the efficiency of some public facilities is not independent of the location of these facilities, it may be desirable for the government to acquire particular parcels of land in advance of the formulation of any specific plans for the development of these parcels in order to preserve these sites from premature private development in other, less valuable uses.

Admittedly, the prospect of premature private development exists for both properties which are especially appropriate for certain public

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\*Boyce (8), pp. 294-295 and 301.

uses and for properties which are particularly suitable for specific private uses. However, this prospect is substantially greater for land which is uniquely qualified for the development of a public facility because the manner in which the government's power of eminent domain determines the value of a parcel of land effectively discourages property owners from refraining from developing in private uses properties which they recognize will eventually have higher values in public use. Specifically, the compensation which is paid when a parcel of land is condemned by the government is set equal to the fair market value which that parcel can be expected to attain as a result of competition among private land users. Since the property owner is offered no opportunity to obtain any of the incremental value which his property will earn when it is developed in a public use, he has no incentive to take this incremental value into account in his decision to develop this property. Consequently, he will rationally choose to develop his property in a private use -- and, hence, to earn short-term returns from this use -- despite his recognition that his adoption of this strategy will impose incremental demolition or conversion costs upon the government when his property eventually is condemned.

Acknowledging this tendency of urban property markets to promote intertemporal inefficiency in the allocation of uses of land, the desirability of permitting the government to purchase private property in voluntary market transactions in advance of specific plans for the use of this property becomes obvious.\* Moreover, to the extent that the compensation costs associated with the exercise of the right of eminent domain are substantially lower when private property is acquired prior to its development for a private use than when it is acquired after this development, the application of the right of eminent domain to the advance acquisition of property also appears to be desirable.

#### 3.2.2.3 Inverse Condemnation and Environmental Pollution

Air and water pollution generate external effects which may significantly decrease the market values of adversely affected properties. Yet, unless the owners of these properties can identify the sources of this pollution, eliminate all alternative causes of the reduction in property values, substantiate the magnitude of this reduction, and apportion

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\*Shoup (105), pp. 147-205.

this magnitude among the various sources of pollution, it will be impossible for these property owners to recover damages through private legal actions alleging nuisance, ultrahazardous liability, or negligence. Moreover, when the source of the pollution is a public activity, private legal actions are totally precluded by the traditional immunity of government from suits in tort. In situations like these, inverse condemnation actions may represent desirable mechanisms to provide compensation for the adverse external effects which are generated by environmental pollution.

As the title suggests, inverse condemnation actions constitute inversions of ordinary condemnation actions. With ordinary condemnation, the authorized condemning authority initiates a proceeding which requests the condemnation of a particular property for a public use and asks the trial court to determine the just compensation which should be paid for that property. Conversely, with inverse condemnation, the owner of a particular property files a complaint against an authorized condemning authority which alleges that this authority has, in fact, appropriated or damaged his property without paying him the just compensation to which he is entitled.\*

However, the courts generally have ruled that, before any reduction in the market value of private property which has been caused by the generation of environmental pollution by a public facility will constitute the basis of a successful inverse condemnation action, it must be demonstrated that these adverse external effects were foreseeable and that the environmental pollution which causes these effects directly encroaches upon the private property. Similarly, before a successful inverse condemnation action can be based upon the reduction of private property values which is caused by the pollution generation activities of a group of private sources which is so large that it is impossible to apportion the responsibility for this pollution among the individual sources, the courts must rule either that the state government has an affirmative duty to abate environmental pollution or that the state, by chartering a corporation or licensing a business whose operations cause adverse external effects which constitute an appropriation of private property, has effectively delegated to that corporation or business the power of eminent domain. Thus, in the absence of favorable court rulings in the future, inverse condemnation will fail to constitute an effective mechanism for the amelioration of many of the adverse

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\*Lindas (62), p. 125.

effects of environmental pollution despite its potential desirability for this purpose.\*

### 3.2.3 The Concept of Just Compensation

The fifth amendment of the Constitution requires that the owner of any property which is appropriated through the exercise of the right of eminent domain must receive just compensation for this property. The objective of this requirement is to provide to the property owner precisely that amount of income which will place him in the same position which he would have occupied if his property had not been condemned. In attempting to attain this objective, the courts have been confronted with the problem of establishing standards for the determination of this amount of income.

Correctly, the courts have rejected the value which is attached to the property by the condemning agency as the appropriate standard. This value constitutes the amount of income which must be surrendered by the condemning agency to place that agency in the same position which it would have occupied if it had not appropriated the property. Clearly, if the condemnation of the property promotes economic efficiency, this valuation generally will exceed the amount of income which the courts desire to ascertain.

Somewhat less justifiably, the courts also have rejected the value which is attached to the property by its previous owner as an appropriate standard for the determination of just compensation. Admittedly, the direct acceptance of this value as the amount of income which should be paid to the owner of condemned property will usually result in the payment of excessive compensation to that individual because this value fails to account for the existence of any substitutes for the property which has been condemned. However, this value does provide a considerable amount of valuable information about the personal loss which the property owner sustains when condemnation occurs. Hence, it appears desirable to include this value as one indicator of the appropriate magnitude of adequate compensation,

Yet, instead of employing either of these value measures in their determination of just compensation, the courts have chosen to rely exclusively upon the value for which the property might be expected to be exchanged in the market as their appraisal standard. Conceptually,

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\*Kramon (55).

this value represents the price which will be voluntarily negotiated for this property by a hypothetical seller who is willing but not obligated to sell and a hypothetical buyer who is willing but not obligated to buy.\* Although this amount of compensation will be sufficient to place the property owner in the same position which he would have occupied if his property had not been condemned if all property owners have equal access to the mortgage market, if there are other properties which are considered by the property owner to be perfectly equivalent to the condemned property and are available to him at a price equal to the amount of compensation, and if there are no costs associated with relocating from the condemned property to any other property, these conditions generally will not be satisfied in any realistic situation. Consequently, the judicial standard for the determination of just compensation will systematically award compensation which is inadequate to return the property owner to the position which he occupied prior to the condemnation of his property. In effect, application of this judicial standard causes the property owner to be compensated only for the value of the property which has been appropriated and, hence, fails to compensate him adequately for all of the damages which the appropriation of his property has imposed upon him.\*\*

#### 3.2.3.1 Highest and Best Use

Fortunately, in implementing this judicial standard, the courts have adopted the general principle that a proposed land use which is higher and better (i.e., capable of earning a greater return for the property owner) than the presently existing land use constitutes a legitimate basis for estimation of the value of the property, provided that the proposed use is not excessively remote or speculative. Since the market value of a parcel of land is determined not only by the returns which are earned by its present use, but also by the returns which are expected to be earned by its potential future uses, it clearly would be inappropriate to estimate the amount of compensation which should be paid for a property solely on the basis of the value which this property would possess if it were retained in its present use perpetually.

Yet, the necessity of considering the potential future use of a property imposes several obvious problems upon the courts. In particular, in evaluating any particular property, not only must the courts

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\*Klein (54), p. 9; Lawrence (57), pp. 16-18; and Sengstock and McAuliffe (104), pp. 190-191.

\*\*Klein (54), p. 10.

forecast the expected future market demands for the use of this property, they also must analyze the existing legal constraints upon the initiation of these potential future uses and predict the possibility of future legislative or judicial relaxation of these constraints. Thus, the essential consideration of the potential future use of a property unavoidably introduces undesirable elements of subjectivity, inconsistency, and error into the determination of just compensation.\* Moreover, even if these practical problems can be successfully managed, the established judicial standard remains inadequate as a mechanism to compensate property owners for all damages which are imposed upon them by the condemnation of their property.

### 3.2.3.2 Displacement Costs

The exercise of the right of eminent domain to appropriate a particular property may impose direct costs upon the owner of this property which will not be reflected in the objectively determined market value of the property. First, the transferring of legal title to the property to the state may cause the owner to incur several miscellaneous costs, such as recording fees, title transfer taxes, penalties for the prepayment of a mortgage, and loss of prepaid property taxes. Historically, the property owner has been unable to recover these costs from the condemning agency, although some recent legislation, such as the Federal Aid Highway Act of 1968, provides for their compensation.\*\*

Second, because the judicial standard for the determination of just compensation estimates the value of a property on the basis of a hypothetical exchange between an average buyer and an average seller, it fails to recognize any special circumstances which might be associated with the manner in which the owner of the property which is being condemned has originally purchased this property. This failure to recognize special circumstances may impose substantial displacement costs upon some property owners. In particular, low-income buyers who can afford to pay only very low down payments generally are considered to be poor credit risks and, consequently, are required to pay inflated prices for property. When a property which has been purchased at an inflated price is condemned, the owner of this property frequently loses any equity which he has established and may be required to pay a

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\*Berger (5), pp. 87-91.

\*\*Bosselman, Newsom, and Weaver (7), pp. 9 and 11.



deficiency judgment in addition to this compensation award in order to settle his remaining indebtedness on the property. Despite a recent court ruling that the holders of mortgages on property are entitled only to payment of the realistic present value of their rights to future payments discounted at a rate which appropriately accounts for the credit risk,\* few courts apply this alternative valuation approach. As a result, exercise of the right of eminent domain may cause many property owners to lose equity which they have acquired in property which is condemned.\*\*

Finally, since plans to develop public improvements usually are announced substantially earlier than property is condemned for the development of these improvements and since in most states the date for which fair market value is determined is the date on which the condemning agency initiates court action to appropriate the property, the owner of condemned property may' suffer losses as a result of the delay between the announcement of a project and the acquisition of his property. Specifically, he is likely to be damaged if, for personal reasons, he is required to dispose of his property at a depressed price before it is condemned. Similarly, if his property is income property, he may lose rental income if any of the leases on this property expire prior to the date of condemnation. Finally, since the knowledge of the impending public project will both encourage emigration from the neighborhood and encourage the deterioration of the properties in the neighborhood, market value of any property in this area is likely to decline during the period between announcement of the project and the appropriation of the property. Since the compensation which is paid for a property is determined at the date of acquisition of the property, all of this decrease in market value will be borne by the private property owner. Moreover, under either current eminent domain or supplementary legislation, none of these losses can be recovered from the condemning agency by the property owner.\*\*\*

#### 3.2.3.3 Relocation Costs

The relocation of a family or business may require a substantial expenditure of time and resources and, hence, may impose substantial

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\*Mayme Riley vs. District of Columbia Redevelopment Land Authority, 246 F.2d 641 (D.C. Cir. 1957).

\*\*Bosselman, Newsom, and Weaver (7), pp. 9 and 11; and Dagen and Cox (24).

\*\*\*Bosselman, Newsom, and Weaver (7), pp. 9-11.

costs upon the family or business which is forced to relocate. These costs include the cost of searching for replacement facilities; the transportation, food, and lodging costs incurred while performing the actual movement; and any incidental costs of acquiring replacement facilities, such as costs of appraisal, survey, title examination, and closing for purchasers of property or security deposits for utility service or advance payment of rent for renters. In addition, some families may incur certain indirect costs, such as the loss of support from family members who live near to their previous residence; while businesses may suffer a loss of business or goodwill which will permanently affect the profitability and value of their enterprise. Moreover, some businesses, primarily small, marginal retail establishments or firms with special licensing or zoning requirements, may fail to relocate successfully and, hence, may cease to exist. Finally, both families and businesses often discover that the cost of equivalent replacement facilities exceeds the compensation which they have received for their condemned property. This situation is especially likely to arise when the public project for which their property has been appropriated has significantly reduced the total supply of facilities at a particular price level.

Traditional notions of just compensation do not provide for the recovery of any of these relocation costs, although some supplementary legislation does authorize the payment of compensation for actual moving costs and for the increased cost of replacement facilities. However, even this legislation permits the payment of compensation only to those families, businesses, and individuals who relocate after their property has been appropriated. Thus, those who move after the announcement of a project but prior to condemnation of their property are required to pay all of their relocation expenses.\*

#### 3.2.3.4 Employment Costs

A resident who is displaced by an exercise of the right of eminent domain may be unable to locate a new residence which is as near as his previous residence to his place of employment. If this occurs, he will be required to pay increased commuting costs to reach his place of employment. In fact, if the location of his new residence makes it impossible for him to reach his place of employment, he may actually

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\*Bosselman, Newsom, and Weaver (7). pp. 9-11; and Millspaugh (74), pp. 13, 18-20, and 25.

suffer a loss of employment as a result of his relocation. Similarly, if his place of employment has also been condemned and has failed to relocate, loss of employment will result. Neither current eminent domain law nor supplementary legislation provides for the payment of compensation for these costs.\*

#### 3.2.3.5 Psychic and Emotional Damages

If an individual who is displaced by the condemnation of his residence is forced to relocate at a considerable distance from that residence, he may suffer from the disruption of relationships which he has built up in his old neighborhood. Although most of these dislocation costs probably will be associated with the psychological stresses of moving away from family and friends, some direct financial hardship may arise from the disruption of business and credit relationships which have been established with local merchants. In addition, even if this individual succeeds in obtaining a new residence in his old neighborhood, the public project for which his previous residence has been condemned may so disrupt the neighborhood that it becomes a less convenient and less desirable area in which to live. Yet, once again, provision for the payment of compensation for these psychic costs does not exist in either traditional eminent domain law or supplementary legislation.\*\*

#### 3.2.3.6 Severance Damages

The condemnation of a portion of a parcel of land may adversely or beneficially affect the value of the portion of the parcel which has not been condemned. In principle, the measure of the amount of compensation which is paid to the owner of this parcel is the difference between the value of the parcel before the condemnation and the value of the uncondemned portion of the parcel after this appropriation. Thus, both the beneficial and adverse effects of the severance of a parcel of land are considered in the determination of the appropriate compensation for this severance. Yet, the courts generally have ruled that severance effects will influence the amount of compensation which is paid for the appropriation of a portion of a property only if these severance effects modify the market value of the uncondemned land rather than merely the market value of the business or activity

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\*Bosselman, Newsom, and Weaver (7), pp. 10 and 12.

\*\*Ibid., pp. 10 and 12; and Klein (54), pp. 1-39.

which is operated on this land. Moreover, these severance effects must be clearly attributable to the new public facility and must specifically affect the uncondemned parcel of land.\* Clearly, the principle of adjusting compensation payments to reflect severance effects is not always honored in practice.

An additional problem arises when an exercise of the power of eminent domain appropriates a portion of the property of an individual who owns two or more distinct parcels of land. Theoretically, if these two or more parcels exhibit a unity of use, severance effects should influence the payment of compensation to the owner of this property to the same extent that they would affect the payment of compensation for the appropriation of a portion of a single tract of land. However, in practice, the courts have not uniformly permitted the adjustment of compensation payments to reflect severance effects in situations of this type.\*\*

#### 3.2.3.7 Impairment of Access

Impairment of access frequently occurs either when a highway which abuts a commercial property is transformed into a limited access highway or when a highway of this type is left untouched while a new super-highway which diverts much of the traffic which previously has used the older road is constructed parallel to that road. In either instance, the owner of the commercial property is damaged by the reduction of traffic on the road which abuts his property. While this situation appears to be very similar to the situations in which severance damages have been permitted to influence compensation payments, the courts have tended in recent years to rule that an abutting property owner does not possess any property right which compels the state to maintain either a road or its traffic under threat of the payment of damages.\*\*\*

#### 3.2.3.8 Hazardous Uses

When a portion of a parcel of land has been condemned for the development of a hazardous public use, such as a gas transmission line, a high tension line, or a guided missile site, the prospective

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\*Edens (40), p. 317.

\*\*Berger (5), pp. 93-95.

\*\*\*Ibid., p. 96.

development of this use may induce fear or anxiety in the owner of the uncondemned property. Recent court decisions have established a trend of permitting the payment of severance damages in these situations if the proposed use clearly presents an immediate danger and if the development of this use is not uncertain or remote.\* Thus, in certain restricted instances, compensation can be paid for psychic or emotional damages.

#### 3.2.3.9 Interest on the Condemnation Award

Appreciable delays frequently occur between the date on which property is appropriated by an exercise of the right of eminent domain and the date on which compensation is paid for this appropriation. Consequently, the courts have ruled that it is proper to pay additional compensation for these delays in the receipt of the basic compensation payment. In particular, the courts have decided that property owners should be paid interest on this basic condemnation award throughout the term of the delay.

The basic problem which has confronted the courts in applying this decision is the determination of the appropriate interest rate to apply to the basic compensation payment to calculate the magnitude of the incremental compensation. In addition, the requirement that this incremental compensation must be paid has increased the total amount of compensation which is paid in some states to such a great extent that several state legislatures have enacted statutes which require condemning agencies to deposit a specified proportion of the expected basic compensation payment in a trust fund at the time of condemnation.\*\*

#### 3.2.3.10 Costs of Litigation

If a property owner decides to challenge an exercise of the right of eminent domain, he probably will incur substantial attorney fees. Moreover, in the absence of supplementary legislation, these litigation costs will not be considered in the court's determination of the amount of compensation which will be paid. At the present time, only a few states have enacted legislation which permits the reimbursement of attorney fees by condemning agencies. This granting of reimbursement of legal fees probably will motivate an increase in the challenging

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\*Ibid., pp. 96-97.

\*\*Ibid., pp. 92-93.

of condemnations of private property and may substantially increase the total cost to the states of acquiring property. However, these increased costs must be compared with the benefit which society obtains when it assures that those individuals who normally would not obtain legal counsel will receive. condemnation awards which are consistent with just compensation.\*

Clearly, this pattern of reasoning should be applied to any judicial decision to consider or ignore any particular element of damage to the property owner in the determination of just compensation. Specifically, the courts should compare the increase in economic efficiency which will be produced if a particular element of damage is included in judicial compensation decisions with the sum of the administrative costs which will be incurred if this element is included and the demoralization costs which will be borne by members of society if this item is excluded from consideration. Only if this comparison is favorable should the element of damage be systematically introduced into the court's decision-making process.\*\*

Application of this criterion undoubtedly will result in the inclusion of several additional elements of damage in the determination of just. compensation and, consequently, will increase the cost of exercising the right of eminent domain. However, since the traditional method of determining just compensation systematically grants awards which are less than the full opportunity cost of condemnation and, hence, encourages the development of public projects which are socially undesirable, this increase in the cost of condemnation will promote an improved allocation of real property between the public and private sectors.

Nevertheless, introduction of this criterion probably will not produce the inclusion of psychic or emotional costs into the determination of just compensation. Since these costs are subjective, they are essentially immeasurable. It is impossible to distinguish valid claims for substantial psychic costs from attempts to exploit the condemning agency. Thus, it inevitably will be necessary to continue to rely upon fair market value as the basic determinant of just compensation.\*\*\*

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\*Ibid., pp. 97-99.

\*\*This analytical technique initially has been proposed in Michelman (73).

\*\*\*Edens (40), pp. 321-322.

### 3.2.4 The Measurement of Just Compensation

The judicial standard for the determination of just compensation establishes as the appropriate amount of compensation for a property the price that will be voluntarily negotiated for this property by a hypothetical seller who is willing but not obligated to sell and a hypothetical buyer who is willing but not obligated to buy. However, since this price cannot be directly observed in any actual market, it has been necessary to develop acceptable techniques for the estimation of this price. Currently, there are three principal appraisal techniques which are employed to evaluate property in eminent domain proceedings. These techniques are the market data approach, the income capitalization approach, and the reproduction or replacement cost approach.

#### 3.2.4.1 The Market Data Approach

If properties which are identical to the parcel of land which is being condemned have been exchanged in a free and open market, the prices which have been paid for these substitute properties should constitute reliable estimates of the value of the condemned property. Even if these other properties are merely comparable, but not identical, to the condemned parcel, their market prices should be valid indicators of the value of the condemned parcel to the degree that these properties are similar to the condemned property. Since the computation of an appraisal value for a property on the basis of comparable sales data obviously reflects the interaction of supply and demand, this technique is generally considered to be the most reliable approach to the estimation of the value of condemned properties. In fact, comparable sales data is accepted in most states as independent substantive evidence of the market value of condemned property. However, its usefulness in this manner is restricted to some extent by the inhibitions of the judicial rule concerning the admissibility of hearsay evidence. Nevertheless, comparable sales data is accepted in all jurisdictions as a foundation for an expert's opinion of the value of a condemned property.

Before the price which has been paid for a particular property can be utilized in the estimation of the value of a property which has been condemned, it must be demonstrated that these parcels of land are similar. This demonstration of similarity must be predicated upon their geographic proximity to the same centers of economic activity and their uniformity in quality, size, and use. In addition, the comparable sale must have occurred within a reasonable period of time prior to the appropriation of the condemned property. Sales

which are consummated subsequent to the date of condemnation are eliminated from consideration as comparable sales because the prices which are established in these sales may have been influenced by the condemnation itself. Finally, the comparable sale must have been a voluntary exchange in a free and open market. Consequently, the sale of a property to a potential condemning agency generally is inadmissible as a comparable sale because it may lack voluntariness and freedom from compulsion, although some states will accept a sale of this type as a comparable sale if a demonstration of its voluntariness can be provided.

The courts also refuse to recognize offers to sell or offers to buy as indicators of the value of a condemned property, presumably because of the ease with which evidence of this type can be fabricated. Similarly, appraisals of property value which are made for purposes other than condemnation are usually excluded from consideration in eminent domain actions. This judicial inflexibility may be inconsistent with the attainment of the best possible estimate of the value of a condemned property, particularly when valid comparable sales data is limited. Consequently, the accuracy of the measurement of just compensation might be improved in many instances if the courts would exhibit greater flexibility in admitting these types of information at least as evidence to support an expert's appraisal of the value of a condemned property.\*

#### 3.2.4.2 The Income Capitalization Approach

The theory of income capitalization is founded on the fundamental economic concept that the value of a productive asset is most appropriately measured on the basis of the amount of income that it generates. Consequently, the income capitalization approach estimates the value of a condemned property as the amount of wealth which, if it were invested at the same rate of return which would have been earned by this property if it had not been condemned, will yield for the property owner the same stream of income which would have been generated by his property if it had not been condemned. Clearly, the estimation of this amount of wealth requires predictions of both the future stream of income which the condemned property would have earned and the rate of return on the value of this property which this stream of income

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\*Massey (68), pp. 2-3; and Sengstock and McAuliffe (104), pp. 192-206 and 229.



would have represented. In addition, since the business which occupies the condemned property usually can be relocated and, hence, generally is not appropriated by the condemning agency, the stream of income which must be forecast is not the total stream of income which is generated by this business on this property, but merely the portion of this total stream of income which constitutes the rental income of the property.

This necessity of extensive forecasting and allocation of income causes the income capitalization approach to be the most complicated and the most conjectural method of estimating the value of a condemned property. Moreover, since the value which is estimated using this approach is extremely sensitive to the rate of return at which the stream of rental income is capitalized, this approach also is the most speculative appraisal technique. Consequently, the courts are very reluctant to accept the capitalization of income as the sole basis for the estimation of the value of a condemned property, although they frequently will admit evidence of this type as confirmation of appraisals which have been produced by other methods. Furthermore, the courts occasionally will accept the capitalization of income as the exclusive basis for the appraisal of the value of certain special purpose properties which are exchanged too infrequently to permit the obtaining of valid comparable sales data, such as large-scale rental property.\*

#### 3.2.4.3 Reproduction or Replacement Cost Approach

To determine reproduction costs, an estimate is obtained of the cost of building the condemned structure anew on the condemned property. The estimated physical and functional depreciation of the existing structure is then deducted from this estimated cost to produce an appraisal of the replacement cost of the existing use. Replacement cost evidence is admissible in the determination of the value of a condemned property if the existing structure is adjudged to be suitable for the property on which it is constructed. However, this evidence generally is not admissible if the structure is so inferior that it constitutes a detriment to the value of the property or if it is so expensive and elaborate that it is inappropriate for the property and its neighborhood.

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\*Level (60); Massey (68), p. 3; and Sengstock and McAuliffe (104), pp. 206-222 and 229.

The replacement cost approach has been widely criticized on the grounds that it initiates its evaluation process with an estimated cost which may bear no relationship to the value of the property (in the sense that the property owner would not choose to construct a structure of this type if his property were vacant) and then adjusts this estimated cost by deducting from it an estimate of depreciation which usually must be calculated without sufficient factual data. Nevertheless, because of the absence of any other proof of value, the replacement cost approach is often employed to appraise the value of special purpose properties which are relatively unique and infrequently exchanged, such as churches or schools.\*

#### 3.2.4.4 The Objectivity of the Measurement Techniques

Although the established judicial standard for the determination of just compensation has been adopted by the courts in an attempt to assure objectivity in the appraisal of the value of condemned properties, the application of this standard to the estimation of the value of a particular property requires the exercising of substantial subjective judgment by the appraiser. Even when the appraiser employs the market data approach, judgment is required in the selection of properties which are considered to be comparable to the condemned property. Moreover, when comparable sales data are unavailable for a particular type of property, the utilization of the income capitalization approach or the replacement cost approach requires the exercising of considerably more discretion by the appraiser. Since each appraiser unavoidably introduces his own attitudes and prejudices into his estimation of the value of any property, it is not surprising that different appraisers frequently assign different estimated values to the same property.\*\*

#### 3.2.5 Procedural Considerations

##### 3.2.5.1 Prior Negotiations

Condemning authorities normally attempt to avoid lengthy, expensive judicial condemnation proceedings by attempting to acquire desired property through direct voluntary negotiation. However, situations

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\*Level (60); Massey (68), p. 3; and Sengstock and McAuliffe (104), pp. 222-230.

\*\*Edens (40), p. 317.

occasionally arise in which a condemning authority can function most efficiently if it resorts directly to the judicial process without making any attempt to negotiate a mutually agreeable purchase of the property. For example, a condemning authority might be suddenly confronted with a problem whose resolution can be performed effectively only if the authority can obtain the immediate acquisition of a particular parcel of land. Yet, several states have enacted legislation which requires the condemning authority to attempt to negotiate an amicable purchase of any property before it initiates condemnation proceedings. Inflexible compliance with this legislation may in some instances introduce substantial inefficiencies into the operations of that agency.\*

#### 3.2.5.2 The Right to Appeal Condemnation Awards

Several recent court decisions have addressed, but have not completely resolved, the issue of the effect that payment of a preliminary condemnation award should have on the right of either the condemning authority or the owner of the condemned property to appeal the magnitude of this award. If the condemning authority is prohibited from taking possession of a property unless it pays the preliminary condemnation award and if it surrenders its right to appeal the magnitude of this award either when it pays the award or when it acquires the property, the authority may incur substantial increases in project costs if it chooses to appeal the award. Specifically, the delay in the initiation of this agency's project which is generated when the condemning authority is denied immediate possession of the condemned property while it appeals the condemnation award will impose sizable opportunity costs upon the authority. In fact, in extreme circumstances, these costs may be sufficiently large to cause the cancellation of the project.

Similarly, if the owner of the condemned property surrenders his right of appeal when he accepts a preliminary condemnation award, any decision to appeal the magnitude of this award will deprive him of both the use of his property and the use of any provisional compensation for this property until the appeals procedure has been concluded. Conversely, if this property owner is permitted to acquire and spend a provisional compensation award while an appeal is being processed by the courts, it is conceivable that, when a final determination of the appropriate amount of compensation is achieved, this individual may

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\*Berger (5), pp. 99-100.

have withdrawn and squandered an amount of income in excess of the final condemnation award and that the condemning authority will be unable to recover the difference between the property owner's actual withdrawals from the provisional award and the award which ultimately is authorized.

Clearly, some reconciliation by the courts or the legislatures of these competing public and private interests in a manner which reasonably accounts for the unavoidable tradeoffs between these interests would be desirable.\*

### 3.2.5.3 Private Input Into Condemning Authority Decisions

The existing administrative procedures which are employed by condemning authorities frequently do not adequately consider the interests of the individual owners of condemned property. Although these property owners generally have the right to appear at a public hearing which is conducted by the condemning authority, this right may be illusory to the extent that the full details of the authority's proposed project are not enunciated prior to this hearing and, hence, the property owners are not granted sufficient time to prepare cases to challenge the propriety of the project.

In addition, most state legislatures have not delineated either the scope of the courts' authority to review the decisions of condemning authorities or the procedures which the courts must follow in conducting a review of one of these decisions; although some jurisdictions have enacted administrative procedures acts which address the latter issue by specifying both the manner in which the condemning authority should make its determinations and the method by which the individual property owner can protest this decision. The universal adoption by state legislatures of both statutes of this type which adequately consider the rights of the owner of the condemned property and legislation which specifies the power of the courts to review the condemnation and compensation decisions of condemning authorities would greatly increase the predictability and equity of the condemnation process.\*\*

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\*Ibid., pp. 100-103.

\*\*Ibid., pp. 103-104.

### 3.3 Conclusions

The preceding discussions of the operational problems associated with the implementation of such traditional land use control techniques as municipal zoning, subdivision regulation, building codes, and the exercise of the right of eminent domain clearly demonstrates that these mechanisms do not constitute, either individually or in combination, ideal methods for the regulation of private real property. Each of these techniques is restricted in its application and limited in its effectiveness by numerous administrative, economic, judicial, legal, and political problems.

However, this chapter has not demonstrated either that the unconstrained market could perform the allocation of activities to parcels of land more efficiently, that any alternative land use control mechanisms could regulate the use of real property more effectively, or that any modifications of these traditional techniques could cause them to function more satisfactorily. The resolution of these issues constitutes the primary objective of the remainder of this report.